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No.

# In the Supreme Court

OF THE

# United States

OCTOBER TERM, 1984

DAVID MITCHELL and CATHERINE MITCHELL,
*Appellants,*

vs.

LOUIS P. MOUNTANOS,
*Appellee.*

## JURISDICTIONAL STATEMENT

**On Appeal from the Court of Appeal of the State of California, First Appellate District, Division Three**

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May, 1984

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## QUESTIONS PRESENTED

In California the statute of limitations in a civil action is tolled while a defendant is physically absent from the state—notwithstanding the fact that the mere filing of a complaint tolls the running of the statute, and irrespective of the defendant's amenability to service of process. The statute of limitations in an action against a resident who travels outside the state is extended by the combined duration of his or her absences; a non-resident over whom personal jurisdiction may be exercised is potentially forever subject to suit. Corporate defendants, on the other hand, are not subject to the tolling provision, as they are never "physically absent" from the state if they are doing business in the state. The detrimental and discriminatory impact of this provision on the various categories of potential defendants gives rise to the following constitutional questions:

—Does California's tolling statute, California Code of Civil Procedure section 351, violate the Equal Protection guarantee of the Fourteenth Amendment by selectively burdening the exercise of the fundamental right to travel?

—Does California's tolling statute, California Code of Civil Procedure section 351, irrationally and therefore impermissibly discriminate against residents who travel temporarily outside the State, and against nonresident individuals, in violation of the Equal Protection clause of the Fourteenth Amendment?

## PARTIES IN THE CALIFORNIA COURT OF APPEAL, FIRST APPELLATE DISTRICT, DIVISION THREE

The parties to the action before the California Court of Appeal, First Appellate District, Division Three, are: defendants David Mitchell, a California resident, Catherine Mitchell, a North Carolina resident, David MacDonald, a Canadian resident and author of the alleged libel, Reader's Digest Association, the publisher of the alleged libel, professor Richard Ofshe, a California resident, and Sheriff Arthur Disterheft, a California resident; and plaintiff Louis P. Mountanos.

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vs.

LOUIS P. MOUNTANOS,
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## JURISDICTIONAL STATEMENT

**On Appeal from the Court of Appeal of the State of California, First Appellate District, Division Three**

David Mitchell and Catherine Mitchell, Appellants before this Court and Defendants in the libel action below, appeal from the order denying their motion for summary judgment. That motion challenged as unconstitutional California Code of Civil Procedure section 351, which tolls the running of the statute of limitations during a defendant's physical absence from the state. The California Superior Court, County of Marin, denied Appellants' motion for summary judgment in a minute order filed December 8, 1983. Appellants' petition for a writ of mandate and/or prohibition directing the Superior Court to enter an order granting their motion for summary judgment on the grounds that the tolling provision is unconstitutional was denied by order of the Court of Appeal of the State of California, First Appellate District, Division Three, entered January

11, 1984. The California Supreme Court denied Appellants' petition for hearing by order entered February 15, 1984.

## OPINIONS BELOW

The order of the California Supreme Court denying Appellants' petition for hearing (App. A, *infra*) was filed on February 15, 1984 and is not reported. The order of the Court of Appeal of the State of California, First Appellate District, Division Three, denying Appellants' petition for a writ of mandate and/or prohibition (App. B, *infra*), was filed January 11, 1984 and is not reported. The minute order of the Superior Court of the State of California, County of Marin, denying Appellants' motion for summary judgment and granting Appellee's motion for partial summary judgment (App. C, *infra*), was filed December 8, 1983 and is not reported.

## JURISDICTION

The minute order of the California Superior Court, County of Marin, denying Appellants' motion for summary judgment on the ground that the one-year statute of limitations in libel actions was tolled as to Appellants during their absence from the state, was entered on December 8, 1983. (App. C, *infra.*) The order of the California Court of Appeal, First Appellate District, Division Three, denying Appellants' petition for a writ of mandate and/or prohibition, was entered January 11, 1984. (App. B, *infra.*) The order of the California Supreme Court denying Appellants' petition for hearing was entered February 15, 1984. (App. A, *infra.*) The judgment below is therefore final. (*Calder v. Jones*, 52 U.S.L.W. 4349, 4350 n.8 (U.S. March 20, 1984).)

A supplemental notice of appeal to this Court was duly filed in the Court of Appeal of the State of California, First Appellate District, Division Three, on April 30, 1984. (App. D, *infra.*)

This appeal is being docketed in this Court within 90 days of the denial of Appellants' petition for hearing by the California Supreme Court. Because a state statute was upheld against federal constitutional challenge, the jurisdiction of this Court is properly invoked under 28 U.S.C. § 1257(2).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

*Fourteenth Amendment, Section 1, United States Constitution:*

> No State . . . shall . . . deny to any person within its jurisdiction the equal protection of the laws.

*California Code of Civil Procedure, Section 351:*

> If, when the cause of action accrues against a person, he is out of the State, the action may be commenced within the term herein limited, after his return to the State, and if, after the cause of action accrues, he departs from the State, the time of his absence is not part of the time limited for the commencement of the action.*

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*Additional California statutory materials are reproduced in Appendix E, *infra.*

## STATEMENT OF THE CASE

### The Parties

David Mitchell and Catherine Mitchell are journalists who, as residents of California and owners of the small Marin County newspaper the *Point Reyes Light*, investigated and wrote about the strange and violent activities of the Synanon Church, a cult which has drawn widespread public attention since the mid 1970's. For their articles and editorials on Synanon, the Mitchells won the 1978 Pulitzer Prize for Meritorious Public Service.

Reader's Digest Association, Inc., a codefendant below, is a New York corporation whose major publication, the *Reader's Digest* magazine, enjoys one of the largest circulations of any American periodical. The July, 1981 issue of *Reader's Digest* included an article entitled "The Little Paper That Dared," written by codefendant David MacDonald about Appellants, their newspaper, and their prize-winning journalistic exposé of the Synanon organization.[1] That short article is the focus of this litigation.

Appellee Louis P. Mountanos was the Sheriff of Marin County from 1958 to 1978. On June 18, 1982 he filed his complaint in this action, against the Reader's Digest Association and author David MacDonald, against Professor Richard Ofshe and Sheriff Arthur Disterheft, and against the Mitchells, who served, among others, as sources for the article. Mountanos alleges that he has been libeled by the publication of "The Little Paper That Dared."

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[1] A copy of "The Little Paper That Dared" is attached hereto as Appendix F.

**Section 351—California's Tolling Provision**

All defendants pleaded the affirmative defense that plaintiff's suit was barred by the one-year statute of limitations applicable in libel actions (Cal. Code Civ. Proc. § 340, Subd. (3)) and filed motions for summary judgment on that ground. By its order of December 8, 1983 the Superior Court found that June 2, 1981 was the date of the first general distribution of the subject article; that the applicable statute of limitations had run June 2, 1982; and that plaintiff's libel complaint was thus filed *16 days after* the expiration of the one-year limitations period.

As to *individual* defendants, however, the Superior Court then applied section 351, which tolls the running of a statute of limitations during the time a defendant is physically absent from California, even though the defendant is amenable to service of process. Thus the statute of limitations is effectively *extended* by the varied periods during which a potential defendant may be outside the state. In this case, because Sheriff Mountanos filed his complaint 16 days after the expiration of the one-year limitations period, his cause of action will survive only as to defendants who happen to have been absent from California for longer than 16 days. The effect in this case is that the statute of limitations is applied differently with respect to each of the four individual and one corporate defendant.

The Superior Court found that codefendants Richard Ofshe and Arthur Disterheft had been absent only 12 and 5 days, respectively, and therefore granted their motions for summary judgment on the ground that the statute of limitations had run as to them. As to defendant David MacDonald, at all times a resident of Canada, the Court

had earlier granted Sheriff Mountanos' motion for partial summary judgment on the statute of limitations issue, on the basis of section 351. For MacDonald, the statute of limitations will never run, unless and until he spends a total of one year within California's borders.[2]

The Superior Court denied David and Catherine Mitchell's motion for summary judgment, and granted Sheriff Mountanos' motion for partial summary judgment, also on the basis of section 351. The Court observed that in *Dew v. Appleberry*, 23 Cal.3d 630 (1979), the California Supreme Court had upheld section 351 against federal constitutional challenge. As the parties had stipulated, David Mitchell travelled to Thailand for nine days in August, 1981, and to Latin America from approximately March 24, 1982 to May 24, 1982, on assignment as a journalist and reporter. As to Catherine Mitchell, the Superior Court ruled that her departure from California to move to North Carolina, some 6 days before the action was filed, tolled the running of the statute of limitations and barred her assertion of this defense.[3]

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[2]David MacDonald, codefendant in the libel action below, also appeals to this Court, challenging the constitutionality of section 351. Appellants David Mitchell and Catherine Mitchell respectfully request this Court to consider Mr. MacDonald's Jurisdictional Statement in conjunction with their own.

[3]The Superior Court appears incorrectly to base its decision, vis-á-vis Catherine Mitchell, on the fact that she left the state June 12, 1982, even though her departure occurred 10 days *after* the expiration of the one-year limitations period. Although the Superior Court's opinion makes no reference to Catherine Mitchell's three brief absences *during* the statutory period, these facts are in the record through her own declaration. She left the state on a Thursday in November, 1981, returning two days later, on a Saturday; left again December 21, returning December 31, 1981; left February 11, returning February 15, 1982; and finally left California

Finally, the Superior Court granted Reader's Digest Association's motion for summary judgment because the one-year statute of limitations had expired. The Court had earlier ruled that section 351 was inapplicable to the corporate defendant because, as a corporation doing business in the state, it could not "travel" outside the state.

## THE FEDERAL QUESTION RAISED

In a motion for summary judgment Appellants argued that Appellee's suit was barred by the one-year statute of limitations applicable to California libel actions, and raised their claim that California Code of Civil Procedure section 351, which tolls the running of the statute of limitations for such time as a defendant is physically absent from the state, impermissibly burdens the exercise of the fundamental right to travel, and is without rational basis, in violation of the Equal Protection guarantee of the Fourteenth Amendment. (App. G, *infra.*) The Superior Court denied Appellants' motion on the ground that the tolling provision had been upheld by the California Supreme Court against similar constitutional challenge. (*Dew v. Appleberry*, 23 Cal. 3d 630 (1979); App. C, *infra.*)

Appellants then petitioned the Court of Appeal for the State of California, First Appellate District, Division Three, for a writ of mandate and/or prohibition and again argued that California Code of Civil Procedure section 351 is unconstitutional. Appellants' petition was denied without

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on June 12, 1982, to pursue her career—and earn a living—in North Carolina. Thus while Catherine Mitchell did not leave the state permanently until ten days after the running of the one-year statutory period, her brief accumulated absences before she left served to extend her limitations period just long enough to save Appellee's cause of action against her.

opinion. (App. B, *infra.*) Appellants next petitioned the California Supreme Court for a hearing to review the constitutionality of section 351, reiterating the argument that the tolling statute is repugnant to the Equal Protection clause of the Fourteenth Amendment. Appellants' petition was denied February 15, 1984. (App. A, *infra.*) The California Supreme Court thus rejected Appellants' federal constitutional claim, and the judgment below is final. (*Calder v. Jones,* 52 U.S.L.W. 4345, 4350 n.8 (U.S. March 20, 1984).)

The federal claim was thus properly raised below, with the state statute upheld in the face of Appellants' federal constitutional challenge. In such circumstances, the appellate jurisdiction of this Court is properly invoked. (28 U.S.C. § 1257(2).)

## THE FEDERAL QUESTION IS SUBSTANTIAL

The Equal Protection implications of California's statutory provision tolling the running of the statute of limitations during a defendant's physical absence from the state present substantial federal questions not previously considered by this Court. In view of this Court's two recent decisions recognizing the states' broad jurisdictional reach in libel actions (*Calder v. Jones,* 52 U.S.L.W. 4349 (U.S. March 20, 1984); *Keeton v. Hustler Magazine,* 52 U.S.L.W. 4346 (U.S. March 20, 1984)), the need to resolve the Mitchells' constitutional challenge to California's tolling provision becomes particularly acute.

Appellants David Mitchell and Catherine Mitchell, who neither published nor wrote the allegedly libelous *Reader's Digest* article, are denied the complete defense of the statute of limitations against a suit that is clearly time-barred

in California for the sole reason that they each travelled outside the state for more than 16 days during the statutory period. Yet the same statute of limitations is held to bar Sheriff Mountanos' suit against two other individuals, who each spent fewer than 16 days outside California, and against the corporate publisher of the claimed libel, which is deemed continuously present in the state. Section 351 of the California Code of Civil Procedure thus discriminates among potential defendants and selectively burdens the exercise of the fundamental right to travel; yet it serves no rational purpose, much less a compelling state interest. In view of California's comprehensive scheme for preserving causes of action—including a liberal array of long-arm provisions for substituted service of process and two specific provisions that the mere filing of a complaint, rather than its eventual service, tolls the running of the limitations period—it is irrational and capricious to discriminate in the application of the statute of limitations on the basis of physical presence within the state.

Finally, in light of the broad scope of personal jurisdiction now recognized in libel actions (*Keeton v. Hustler Magazine, Inc.*, 52 U.S.L.W. 4346 (U.S. March 20, 1984); *Calder v. Jones*, 52 U.S.L.W. 4349 (U.S. March 20, 1984)), the constitutional vice of California's tolling statute, and others like it, is even more evident: not only are resident defendants treated differently for no other reason than their decision to travel outside the state, but a plaintiff may be able to claim jurisdiction in a state, such as California, where the statute will *never* run as to particular defendants who reside outside the forum. Thus, nonresidents such as David MacDonald—and now Catherine Mitchell—are denied *any* protection under California's purportedly uniform scheme of limitations.

## I

## CALIFORNIA'S TOLLING STATUTE IMPERMISSIBLY BURDENS THE EXERCISE OF THE FUNDAMENTAL RIGHT TO TRAVEL

Equal Protection analysis requires that state legislative classifications burdening the exercise of a fundamental right be justified by a compelling interest. (*See San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 16 (1973).) It is settled that the right to travel is fundamental. (*Shapiro v. Thompson*, 394 U.S. 618, 630-31 (1969).) Thus in *Shapiro* this Court held that the one-year residence requirement imposed by Connecticut, Pennsylvania and the District of Columbia as a precondition to receiving welfare benefits impermissibly penalized the exercise of this fundamental right. (*Id.* at 633.) This Court therefore subjected the state-proffered justifications to the highest level of scrutiny:

> [W]e reject appellants' argument that a mere showing of a rational relationship between the waiting period and [the] admittedly permissible state objectives will suffice to justify the classification. [Citations omitted.] The waiting-period provision denies welfare benefits to otherwise eligible applicants solely because they have recently moved into the jurisdiction. But in moving from State to State or to the District of Columbia appellees were exercising a constitutional right, and *any classification which served to penalize the exercise of that right, unless shown to be necessary to promote a compelling governmental interest, is unconstitutional.* [*Citations.*]

(*Id.* at 634; Emphasis supplied in part.) Finding no compelling state interest, this Court invalidated the measures.

In *Dunn v. Blumstein*, 405 U.S. 330 (1972), this Court stressed that Tennessee's one-year residence requirement as a precondition to voting in state elections constituted a *durational* residence requirement, rather than a simple residence requirement. The Court therefore applied Equal Protection analysis to what it regarded as a right to travel claim:

> To decide whether a law violates the Equal Protection Clause, we look, in essence, to three things: the character of the classification in question; the individual interests affected by the classification; and the governmental interests inserted in support of the classification. [Citation omitted.] In considering laws challenged under the Equal Protection Clause, this Court has evolved more than one test, depending upon the interest affected or the classification involved. First, then, we must determine what standard of review is appropriate. In the present case, whether we look to the benefit withheld by the classification (the opportunity to vote) or the basis for the classification (*recent interstate travel*) we conclude that the State must show a substantial and compelling reason for imposing durational residence requirements.

(*Id.* at 335; Footnote omitted; Emphasis supplied. *Cf. Vostack v. Axt*, 510 F. Supp. 217 (S.D. Ohio 1981).) Concluding that Tennessee's requirement directly impinged on the exercise of the fundamental right to travel (*Id.* at 338), and finding no compelling state interest to justify the classification, this Court struck down the one-year requirement.

Next, in *Memorial Hospital v. Maricopa County*, 415 U.S. 250 (1974), this Court invalidated an Arizona statute requiring a year's residence in a county as a precondition to an indigent's receiving non-emergency medical care.

Again, mere residence requirements were distinguished from *durational* residence requirements, with only the latter warranting strict scrutiny. (*Id.* at 255.) The Court concluded that "Arizona's durational residence requirement for free medical care penalizes indigents for exercising their right to migrate to and settle in that State." (*Id.* at 261-62.) As in *Shapiro* and *Dunn*, the Court found that the state's justifications could not meet the compelling interest test.

Thus, when a state's durational residence requirement selectively penalizes the exercise of the fundamental right to travel, denying to those who travel the benefits that would otherwise accrue to them, the *Shapiro-Dunn-Maricopa* line dictates that the state must demonstrate a compelling interest to justify the discriminatory restraint. By tolling the one-year statute of limitations for libel actions for such time as a potential defendant is absent from the state, section 351 operates as a durational resident reqnirement—indeed as a durational *presence* requirement—and thus selectively penalizes the exercise of the right to travel. Anyone who wishes to secure the full benefit of the limitations period set out in any statute in California must enter the state and remain *continuously present* for that entire period.[4]

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[4]The *Shapiro* mandate that a durational residence requirement may not penalize or burden the exercise of the right to travel does not, of course, imply that the underlying benefit denied to travellers —in this case the protection of the statute of limitations—itself be a fundamental right. The Court has stated, in fact, that there is a statutory, but not a "fundamental" right to welfare benefits, such as were at issue in *Shapiro*. (*Goldberg v. Kelly*, 397 U.S. 254 (1970).) Moreover, if the underlying benefit denied to those who travel were itself a constitutionally recognized fundamental right,

A year following *Memorial Hospital v. Maricopa*, this Court decided *Sosna v. Iowa*, 419 U.S. 393 (1975). In *Sosna* the appellant challenged Iowa's one-year residence requirement for obtaining a divorce. With only passing reference to the right to travel, and without an explicit "penalty" analysis, this Court upheld Iowa's statute on several grounds which in fact distinguish the case from the *Shapiro* line. Principally, this Court noted that laws relating to domestic relations have traditionally been regarded as peculiarly state concerns. (*Id.* at 404.) Hence the observation that some 48 states have laws similar to Iowa's. (*Id.* at 404-405.) Moreover, it was noted that divorce is not a matter affecting merely the individual within a state who seeks a divorce, but also spouses, and often children and property, possibly located in different states; hence Iowa's legitimate interest in avoiding "officious intermeddling" in legal matters in which *other states* have an interest. (*Id.* at 407.)

The basis on which this Court distinguished the facts before it in *Sosna* from *Shapiro* and its progeny also distinguishes and supports Appellants' constitutional challenge here. As Justice Rehnquist observed in *Sosna*, the person who moved to Iowa would, in a year's time, be eligible to obtain the full benefit sought—*i.e.*, a divorce; whereas the woman denied welfare benefits for a year under the legislation challenged in *Shapiro* would have been "irretrievably foreclosed from obtaining some part

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its infringement could be remedied as such, without resort to right to travel analysis. Thus, although there is no "fundamental right" to the protection of a statute of limitations, (*Chase Securities Corp. v. Donaldson*, 325 U.S. 304 (1945)), section 351 selectively and unjustifiably penalizes the Mitchells' exercise of their right to travel.

of what she sought . . ." (*Sosna v. Iowa, supra,* 419 U.S. at 406), just as the plaintiff in *Memorial Hospital v. Maricopa* would have "irretrievably" lost the benefit of a year's medical treatment, or the plaintiff in *Dunn* the right to vote in a particular election. Similarly in this case, had the Mitchells remained physically present within California's borders for the entire one year period following the accrual of Mountanos' cause of action, they would have been forced to forego specific, work-related travel obligations, such as David Mitchell's assignments to Thailand and Latin America, and Catherine Mitchell's out-of-state lectures and interviews. Although at the end of the statutory period they could have resumed out-of-state travel without penalty, their right to travel during that year would "irretrievably" have been lost to them.

Finally, and most importantly, appellant in *Sosna* was merely required to be a *resident* of Iowa for a year under the statute; had she chosen to spend a two-week vacation in Florida, or in Paris, she would *not* have had to wait a year *and two weeks* to obtain her divorce. Nor would the durational residence periods challenged in the Shapiro line have been tolled during the newcomers' temporary absences.

For the Mitchells this latter distinction becomes crucial, for to obtain the benefit they sought—the statutory protection of the one-year limitations period that would have barred the libel suit brought against them—they would have had to remain *continuously present* in California, curtailing the exercise of their right to travel outside the state entirely. A week in Oregon, or a day in Nevada could diminish or destroy the protection of the statute of limita-

tions. Indeed, someone unaware that a cause of action had accrued against them would have no reason to know that if they travelled outside the state they did so at the high cost of extending the applicable limitations period and possibly losing the statute of limitations defense altogether.

That section 351 penalizes the exercise of the right to travel on a selective and discriminatory basis is evident not only from the fact that residents who remain within the state for a year are guaranteed legal protections denied to those residents who travel during the same period, but also from the fact that the tolling provision discriminates against *individual* residents in favor of *corporate* entities that do business in the state. In *Loope v. Greyhound Lines, Inc.*, 114 Cal. App. 2d 611 (1952) the court held that section 351 is inapplicable to foreign corporations doing business in the state. Thus in this case Reader's Digest, the New York corporation that actually published the allegedly defamatory article, has been permitted to avail itself of California's statute of limitations defense, while David and Catherine Mitchell, who did not publish the article but who are merely its subject, are denied the benefit of this defense because their work as journalists took them temporarily outside the state.

Not only does California law discriminate against resident individuals who travel outside the state in favor of corporations doing business in the state, but it further discriminates among residents who travel, even favoring certain *nonresidents* sued in California, based on the nature of the tort allegedly committed. California Vehicle Code

sections 17459 and 17460 provide, respectively, that the acceptance by a resident of a certificate of automobile ownership or registration or the acceptance or retention of a California driver's license constitutes consent to personal service of summons, "*whether or not he is then resident of this state. . .*" Vehicle Code section 17463 further provides that "Notwithstanding any provision of Section 351 of the Code of Civil Procedure, when summons may be personally served upon a person as provided in Sections 17459 and 17460, the time of his absence from the State *is* part of the time limited for the commencement of the action described in those sections. . ." (Emphasis supplied.) Thus, the California courts have squarely held that when a motorist whose car is registered in California or who holds a California driver's license is involved in an automobile accident in the state and has then been absent from the state during the statutory period or has permanently left the state, the statute of limitations in any action brought against him is *not* tolled if he is amenable to service of process and can be located through reasonable diligence. (*Bigelow v. Smik*, 6 Cal. App. 3d 10 (1970); *Dovie v. Hibler*, 254 Cal. App. 2d 673 (1967); *See also Hirsch v. Blish*, 76 Cal. App. 3d 163 (1977); *Garcia v. Flores*, 64 Cal. App. 3d 705 (1976).) Such resident and former-resident tortfeasors may reap the full benefit of the statute of limitations, *regardless* of their presence or absence during the statutory period, while California residents accused of libel who travel outside the state during the statutory period do not, *regardless* of their amenability to service of process.

## II

## CALIFORNIA'S TOLLING STATUTE FURTHERS NO COMPELLING INTEREST NOR IS THERE ANY RATIONAL BASIS FOR ITS APPLICATION

Because section 351 burdens the exercise of a fundamental right by discriminating against certain residents who travel outside the state, under *Shapiro* only a compelling state interest will justify the restraint. However, in view of California's extensive legislative scheme for preserving causes of action, section 351 cannot survive even minimal or "rational basis" scrutiny, much less meet the higher "strict scrutiny" test. California Code of Civil Procedure sections 350 and 411.10 provide that an action is commenced, and hence the statute of limitations tolled, with the mere *filing* of a complaint—and not with the service of a summons on the defendant. Thus, once the plaintiff's cause of action has accrued the defendant's whereabouts are simply *irrelevant* to the plaintiff's ability to toll the statute of limitations; the defendant's presence is obviously not required for plaintiff to file his or her complaint with the court.

Moreover, sections 415.50 and 416.60 through 416.90 of the California Code of Civil Procedure provide ample and detailed means for effecting service of process on persons outside the state. Additionally, section 581a, subdivision (a), of this Code provides that a complaint may be served within three years of its filing, a period which, more appropriately, is extended when a defendant is not amenable to such service.[5]

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[5]Nor does the fact that an action must be brought to trial in California within 5 years of its filing, pursuant to California Code of Civil Procedure section 583, offer any justification for tolling

Thus in California there is no reason whatsoever—much less a compelling one—to toll the statute of limitations during a defendant's physical absence from the state.[8] Both David and Catherine Mitchell were residents of California throughout the one-year statutory period and were at all times amenable to service of process. Moreover, Sheriff Mountanos could fully have preserved his rights by merely *filing* his complaint, any time after the *Reader's Digest* article was published.

That section 351 is arbitrary and irrational is also apparent from the myriad difficulties and potential inequities that arise in calculating periods of absence for purposes of tolling, and hence extending, the statutory period. The basis for determining the date of the expiration of the statute of limitations itself is quite simple—the plaintiff must file his or her complaint by the time the forum court closes its doors on the last *day* of the limitations period. However, the language of section 351 only vaguely provides that "the time" of a person's absence is not to be counted as "part of the time limited for the commencement of the

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the limitations period *prior* to filing. For, like the statute governing service of process, section 583 also provides that the post-filing period is tolled while a defendant is not amenable to service of process.

[8]Indeed in adopting the view that the tolling provision should be applied during a defendant's absence from the state, regardless of whether the defendant is a resident or nonresident, and irrespective of the defendant's amenability to service of process, California has taken a distinctly minority position. The majority of states have taken the position that their tolling provisions do not apply if the defendant is amenable to service, or if residency can be demonstrated through service of process. (*See, e.g., Summerrise v. Stephens*, 75 Wash. 2d 808, 454 P.2d 224 (1969), *Byrne v. Ogle*, 488 P.2d 716 (Alaska, 1970); Annot. 55 A.L.R. 3d 1158, 1173-83 (1974)).

action." A host of different formulations are possible, yielding crucially different results in different cases.

Catherine Mitchell's case serves as an excellent example. As stipulated by the parties, she travelled briefly on three occasions during the June 2, 1981 to June 2, 1982 year. (*See ante,* at fn. 3.) If she is considered absent only those days during which she spent no time in the state, but is deemed present on the day of her departure and on the day of her return, then she was absent only 13 days (one Friday in November, 1981; December 22 through December 30, 1981, inclusive; and February 12 through 14, 1982, inclusive.) If, however, the days of her departure and return are *also* counted as days absent—even though she was in fact physically present in the state some portion of those days—then she was absent a total of 17 days (the Thursday, Friday and Saturday in November, 1981; December 21 through December 31, 1982, inclusive; and February 11 through February 15, 1982, inclusive.) Finally, if the language of section 351 is read most literally, then Catherine would presumably have to establish the total number of *hours* she spent outside California borders, and then divide that figure by 24 to determine how many *days* should be added to the limitations period. Surely the weighty determination of whether a person is to be relieved altogether of the potentially crushing burden of defending a lawsuit should not turn on so trivial a question as how the duration of two or three brief absences from the state is to be reckoned. Indeed, a defendant's very Due Process rights are affected when, to take an extreme example, a day's excursion to a neighboring state, or a sail beyond the harbor, may extend the length of a limitations period. And for those citizens who live and work near—or, more pointedly, *across*—state lines, the problem becomes acute and baffling.

## III

## THE QUESTION OF THE CONSTITUTIONALITY OF CALIFORNIA'S TOLLING STATUTE IS PARTICULARLY SIGNIFICANT IN LIGHT OF RECENT DECISIONS BY THIS COURT

This Court's two recent libel decisions further underscore the significance of Appellants' constitutional claim. In *Calder v. Jones* (52 U.S.L.W. 4349 (U.S. March 20, 1984)), this Court held that jurisdiction under California's long arm statute over the Florida author and publisher of a claimed libel was proper—though defendants themselves had virtually no contact with the State of California—based on the "effects" of their Florida conduct on plaintiff in California. In *Keeton v. Hustler Magazine*, (52 U.S.L.W. 4346 (U.S. March 20, 1984)), decided the same day, this Court held that jurisdiction under New Hampshire's long arm statute over an Ohio corporation was proper, based on the circulation of the allegedly libelous publication in New Hampshire, and that plaintiff was free to "shop" for a forum with an unusually long (6-year) statute of limitations. Thus, the long arm jurisdiction which a state may exercise over non-resident potential libel defendants is now virtually nation-wide.

That the out-of-state publication of libelous material for distribution within a state should subject an author and his publisher to liability in the state of distribution is entirely reasonable. As this Court in *Calder v. Jones* reiterated, under such circumstances a defendant may "reasonably anticipate being haled into court" in the foreign jurisdiction (*World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980)). However, to couple the broad jurisdictional

reach of California's long arm statute, upheld in the *Calder* libel action, with the tolling provision of section 351, is to leave potential libel defendants who reside outside California at the time of publication, or who subsequently move from the state, *forever* subject to suit in California. Thus, David MacDonald, a Canadian journalist whose allegedly libelous article was published in a magazine circulated in California, may be sued in California; yet he may not raise a statute of limitations defense until and unless he spends a full year—or, were he sued in New Hampshire, six years —*within the state's borders.* It is both unfair and unnecessary to allow California to deem a nonresident defendant such as David MacDonald "present" for jurisdictional purposes, yet "absent" for purposes of the statute of limitations. To allow section 351 to stand will allow plaintiffs to shop not only for a forum with a long statute of limitations, but also for one in which some defendants will be denied this defense altogether.

## CONCLUSION

For these reasons, this Court should note probable jurisdiction of this appeal.

Respectfully submitted,

HELLER, EHRMAN, WHITE
& MCAULIFFE
44 Montgomery Street
San Francisco,
California 94104

By STEPHEN V. BOMSE

May, 1984

**(Appendices follow)**

## Appendix A

Clerk's Office, Supreme Court
4250 State Building
San Francisco, California 94102
Feb. 15, 1984

I have this day filed Order

HEARING DENIED

In re: 1 Civ. No. A025587

David & Cathy Mitchell

vs.

Superior Ct., Marin
(Louis P. Mountanos)

Respectfully,

*Clerk*

## Appendix B

Court of Appeal of the State of California
in and for the
First Appellate District
Division Three
No. A025587
Marin Superior Court No. 108199

Filed Jan. 11, 1984

David Mitchell, et al.,
Petitioners,

vs.

Superior Court, County of Marin,
Respondent,

Louis P. Mountanos,
Real Party in Interest.

BY THE COURT:

The petition for writ of mandate/prohibition is denied (White, P. J., Scott, J. and Barry-Deal, J. participated in the decision.)

Dated Jan. 11, 1984

WHITE, P. J.

## Appendix C

In the Superior Court of the State of California
in and for the County of Marin
No. 108199

Louis Mountanos,
Plaintiff,

vs.

Readers Digest Association,
*et al.*,
Defendants.

Filed Dec. 8, 1983

MINUTE ORDER
RULING ON VARIOUS
MOTIONS FOR SUMMARY
JUDGMENT

Under the Single Publication Rule, publication of an integrated issue of a mass media writing occurs upon the first general distribution of the material to the public. The earliest date on which the allegedly defamatory information is substantially and effectively communicated to a meaningful mass of readers is the determinative factor. In ascertaining the date of publication, the courts have looked to the mailing date to subscribers on the theory that the publisher is thereby divested of control, as well as the placement of a substantial body of copies of the publication for sale on the newstands. *Strict vs. Superior Court*, 143 Cal. App. (3rd) 916. Thus, the issue is the earliest time at which substantial distribution took place.

The complaint herein was filed June 18, 1982. However, the defendant Disterheft was out of the state 12 days in the year preceding June 18, 1982; the defendant Ofshe, five days; the defendant David Mitchell approximately 70 to 71 days; and, the defendant Cathy Mitchell left the State of California on June 12, 1982 and, apparently, has not returned to date or, at least, did not return until after the complaint was filed.

CCP 351 provides that if, after a cause of action accrues, a person departs from the state, the time of his absence is not a part of the time limited for the commencement of the action.

This section does not apply to a corporation. *Loope v. Greyhound Lines*, 114 Cal. App. (2nd) 611. Nor is CCP 351 unconstitutional because it suspends the running of the statute of limitations as to individuals but not as to corporations. *Dew v. Appleberry*, 23 Cal. (3rd) 630. Thus, the statute of limitations was not suspended as to Readers Digest Association (RDA), but was as to the individual defendants.

With respect to Cathy Mitchell, the statute of limitations was suspended from June 12, 1982 until after the filing of the complaint, so that the complaint was timely filed as to her.

With respect to David Mitchell, the statute of limitations was suspended for at least 70 days, so that, in order for him to prevail on his statute of limitations defense, the earliest substantial distribution would have had to occur by March 31, 1981. There is no triable issue of fact that any distribution occurred on or before that date, as the

magazine was not even printed by March 31, 1981. Therefore, the plaintiff's complaint was timely filed as to the defendant David Mitchell.

There is no triable issue of fact that the first general distribution of the material to the public took place on or before June 17, 1981. As the statute of limitations was not suspended as to RDA, the filing of the complaint on June 18, 1982 was not timely as to RDA.

The statute of limitations was suspended as to the defendant Ofshe for five days, so that, in order for him to prevail on his defense of the statute of limitations, the first substantial distribution would have had to occur no later than June 12, 1981.

The uncontradicted evidence is that a substantial number of the magazines were accepted into the postal system by June 9, 1981, and that they were thereafter duly delivered, so that some were received by subscribers as early as June 10, June 11 and June 12, 1981. As the plaintiff filed his complaint on June 18, 1982, it is time barred as against the defendant Ofshe.

With respect to the defendant Disterheft, the statute of limitations was suspended for 12 days, so that, in order for him to prevail on his statute of limitations defense, the earliest substantial distribution would have had to occur by June 5, 1981. The evidence reveals that on June 2, 1981, 37,694 copies of the magazine were received into the mail in Alaska and 53,253 copies were received into the mail in Hawaii (Exhibit A to Palermo Declaration). This is the earliest mailing date and is the first general distribution of the article to the public. As the time of such mailing, a

cause of action accrued in plaintiff's favor, causing the statute of limitations to commence running. As the statute of limitations was tolled as to Disterheft for 12 days, the plaintiff had until June 14, 1982 to file his complaint against the defendant Disterheft. He did not file it until June 18, 1982 and, therefore, it is time barred as against the defendant Disterheft.

IT IS ORDERED as follows:

(1) The motion of the defendants Cathy Mitchell and David Mitchell for summary judgment is denied.

(2) The motion of Readers Digest Association for summary judgment is granted.

(3) The motion of defendant Ofshe for summary judgment is granted.

(4) The motion of defendant Disterheft for summary judgment is granted.

(5) The motion of the plaintiff Louis Mountanos for summary adjudication of the statute of limitations defense raised in the defendants' answers is granted as to the defendants Cathy Mitchell and David Mitchell, but is denied as to the defendants Readers Digest Association, Richard Ofshe and Arthur Disterheft.

The plaintiff's request for expenses and attorney's fees is denied.

DATED: 12/6/83

/s/ DAVID MENARY, JR.
David Menary, Jr.
Judge of the Superior Court

## Appendix D

Civil No. A-025587

IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT, DIVISION THREE

David Mitchell and Cathy Mitchell,
Appellants,

vs.

Louis P. Mountanos,
Appellee.

NOTICE OF APPEAL TO THE SUPREME COURT
OF THE UNITED STATES

Notice is hereby given that David Mitchell and Cathy Mitchell, the appellants above named, hereby appeal to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of California, entered February 15, 1984, denying appellants' petition for hearing to review the order of the Court of Appeals of the State of California, First Appellate District, Division Three, entered January 11, 1984 denying Appellants' petition for writ of mandate and/or prohibition.

This appeal to taken pursuant to 28 U.S.C. § 1257(2).

Paul Alexander
Robert E. Borton
Andréa G. Asaro
Heller, Ehrman, White &
McAuliffe
44 Montgomery Street
San Francisco,
California 94104
Telephone: (415) 772-6000

/s/ Andréa G. Asaro

Andréa G. Asaro
Counsel for Appellants

PROOF OF SERVICE

I, Pauline L. Potter, declare as follows:

1. I am employed in the City and County of San Francisco where the mailing described herein occurred; I am over the age of eighteen years; and I am not a party to this action. My business address is 44 Montgomery Street, San Francisco, California 94104.

2. On April 30, 1984, I served the following:

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

in this action by causing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid to be deposited in a United States post office mail box at San Francisco, California, addressed as follows:

[SEE LIST ATTACHED]

I declare under penalty of perjury that the foregoing is true and correct.

Executed on April 30, 1984, at San Francisco, California.

/s/ PAULINE L. POTTER
Pauline L. Potter

Sharon Green, Esq.
Sharon Green, Inc.
300 Montgomery Street
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San Francisco, California 94104

William I. Edlund, Esq.
Pillsbury, Madison & Sutro
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San Francisco, California 94120

Stephen A. McFeely, Esq.
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& Quinn
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Douglas J. Maloney, Esq.
County Counsel

Dorothy R. Jones, Esq.
Deputy
County of Marin
Suite 342, Civic Center
San Rafael, California 94903

## Appendix E

*California Code of Civil Procedure, Section 350:*

An action is commenced, within the meaning of this title, when the complaint is filed.

*California Code of Civil Procedure, Section 411.10:*

A civil action is commenced by filing a complaint with the court.

*California Code of Civil Procedure, Section 415.20:*

(a) In lieu of personal delivery of a copy of the summons and of the complaint to the person to be served as specified in Section 416.10, 416.20, 416.30, 416.40 or 416.50, a summons may be served by leaving a copy of the summons and of the complaint during usual office hours, in his office with the person who is apparently in charge thereof, and by thereafter mailing a copy of the summons and of the complaint (by first-class mail, postage prepaid) to the person to be served at the place where a copy of the summons and of the complaint was left. Service of a summons in this manner is deemed complete on the 10th day after such mailing.

(b) If a copy of the summons and of the complaint cannot with reasonable diligence be personally delivered to the person to be served as specified in Section 416.60, 416.70, 416.80, or 416.90, a summons may be served by leaving a copy of the summons and of the complaint at such person's dwelling house, usual place of abode, or usual place of business in the presence of a competent member of the household or a person apparently in charge of his office or his place of business, at least 18 years of age, who shall be informed

of the contents thereof, and by thereafter mailing a copy of the summons and of the complaint (by first-class mail, postage prepaid) to the person to be served at the place where a copy of the summons and of the complaint were left. Service of a summons in this manner is deemed complete on the 10th day after such mailing.

*California Code of Civil Procedure, Section 415.30:*

(a) A summons may be served by mail as provided in this section. A copy of the summons and of the complaint shall be mailed (by first-class mail or airmail, postage prepaid) to the person to be served, together with two copies of the notice and acknowledgement provided for in subdivision (b) and a return envelope, postage prepaid, addressed to the sender.

*California Code of Civil Procedure, Section 415.40:*

A summons may be served on a person outside this state in any manner provided by this article or by sending a copy of the summons and of the complaint to the person to be served by first-class mail, postage prepaid, requiring a return receipt. Service of a summons by this form of mail is deemed complete on the 10th day after such mailing.

*California Code of Civil Procedure, Section 415.50:*

(a) A summons may be served by publication if upon affidavit it appears to the satisfaction of the court in which the action is pending that the party to be served cannot with reasonable diligence be served in another manner specified in this article and that:

(1) A cause of action exists against the party upon whom service is to be made or he is a necessary or proper party to the action; or

(2) The party to be served has or claims an interest in real or personal property in this state that is subject to the jurisdiction of the court or the relief demanded in the action consists wholly or in part in excluding such party from any interest in such party.

(b) The court shall order the summons to be published in a named newspaper, published in this state, that is most likely to give actual notice to the party to be served and direct that a copy of the summons and of the complaint be forthwith mailed to such party if his address is ascertained before expiration of the time prescribed for publication of the summons. Except as otherwise provided by statute, the publication shall be made as provided by Section 6064 of the Government Code unless the court in its discretion orders publication for a longer period.

(c) Service of a summons in this manner is deemed complete as provided in Section 6064 of the Government Code.

(d) Notwithstanding an order for publication of the summons, a summons may be served in another manner authorized by this chapter, in which event such service shall supersede any published summons.

*California Code of Civil Procedure, Section 416.90:*

A summons may be served on a person not otherwise specified in this article by delivering a copy of the summons and of the complaint to such person or to a person authorized by him to receive service of process.

*California Code of Civil Procedure, Section 581a:*

(a) No action heretofore or hereafter commenced by complaint shall be further prosecuted, and no further proceedings shall be had therein, and all actions heretofore or hereafter commenced shall be dismissed by the court in which the action shall have

been commenced, on its own motion, or on the motion of any party interested therein, whether named as a party or not, unless the summons on the complaint is served and return made within three years after the commencement of the action, except where the parties have filed a stipulation in writing that the time may be extended or the party against whom the action is prosecuted has made a general appearance in the action.

*California Code of Civil Procedure Section 583:*

(a) The court, in its discretion, on motion of a party or on its own motion, may dismiss an action for want of prosecution pursuant to this subdivision if it is not brought to trial within two years after it was filed....

(b) Any action heretofore or hereafter commenced shall be dismissed by the court in which the same shall have been commenced or to which it may be transferred on motion of the defendant, after due notice to plaintiff or by the court upon its own motion, unless such action is brought to trial within five years after plaintiff has filed his action, except where the parties have filed a stipulation in writing that the time may be extended.

* * *

(f) The time during which the defendant was not amendable to the process of the court and the time during which the jurisdiction of the court to try the action is suspended shall not be included in computing the time period specified in any subdivision of the section.

*California Vehicle Code, Section 17459:*

The acceptance by a resident of this state of a certificate of ownership or a certificate of registration of any motor vehicle or any renewal thereof, issued under the provisions of this code, shall constitute the consent

by the person that service of summons may be made upon him within or without this state, whether or not he is then a resident of this state, in any action brought in the courts of this state upon a cause of action arising in this state out of the ownership or operation of the vehicle.

*California Vehicle Code, Section 17460:*

(a) The acceptance or retention by a resident of this state of a driver's license issued pursuant to the provisions of this code, shall constitute the consent of the person that service of summons may be made upon him within or without this state, whether or not he is then a resident of this state, in any action brought in the courts of this state upon a cause of action arising in this state out of his operation of a motor vehicle anywhere within this state.

*California Vehicle Code, Section 17463:*

Notwithstanding any provisions of Section 351 of the Code of Civil Procedure to the contrary, when summons may be personally served upon a person as provided in Sections 17459 and 17460, the time of his absence from this State is part of the time limited for the commencement of this action described in those sections, except when he is out of this State and cannot be located through the exercise of reasonable diligence. . . .

## Appendix F

[July 1981, Reader's Digest]

Convinced that something was dangerously wrong with the powerful California cult called Synanon, the gutsy publishers of a tiny rural weekly marched in where their big-city counterparts feared to tread

### The Little Paper That Dared

By David MacDonald

*If a newspaper is to be of real service to the public, it must have a big circulation.*

—Joseph Pulitzer, 1912

When California's *Point Reyes Light* changed hands in 1975, its assets included a weekly circulation of 1700 copies, one roll-top desk, a potbellied stove, an ancient press and the combined talents of two new owners. But Dave and Cathy Mitchell were about to publish one of the great sagas of American journalism—their own—and prove Joe Pulitzer wrong.

Though Raised in San Francisco, Dave Mitchell, 31, had always preferred to record the plain facts of small-town life. His wife, Cathy, 30, came from Tennessee and had a good head for figures. Married after earning their master's degrees at Stanford, they had worked on papers in Florida, Iowa and northern California before scraping up $37,500 to buy the *Light* at Point Reyes Station (pop. 425), 40 miles above San Francisco in West Marin County. Published in a storefront office near Toby's Feed Barn, the paper was

a chronic money-loser. But, by switching to cheaper printing methods and by sleeping in their cluttered newsroom, the Mitchells hoped to turn it around. Cathy would manage the business side, while Dave, who loved to chase down a good story, would concentrate on local news—"whatever matters in West Marin."

"Kooky Cult." One of Dave's first feature stories was about a commune in nearby Marshall run by the offbeat Synanon Foundation. Synanon was founded in 1958 by Charles Dederich, a reformed alcoholic, to rehabilitate drug addicts. Though his spectacular claims of success were never proved, Dederich and Synanon attracted wide publicity and enough cash donations to start a string of addiction centers.

PHOTO OMITTED

Over the years, Synanon had evolved into what Dederich termed an "alternate life-style community." The ranch-like Marshall facility Dave Mitchell visited was home to 1000 people, some of them paying as much as $400 a month and making gifts as high as a million dollars, all to embrace the new Synanon "religion." Members shaved their heads, wore overalls, and worked at a profitable tax-exempt pen and pencil distributorship. "Superficially," wrote Mitchell, "it all looks like 1984 without Big Brother."

By 1977, however, the picture was changing. First the Los Angeles *Times* ran allegations of child abuse at Synanon. Then *Time* magazine revealed that Dederich had ordered male members of his "kooky cult" to undergo vasectomies and couples to divorce. When San Francisco's KGO-TV disclosed that Synanon had just spent $62,000

for guns and ammunition, reportedly to arm a private police force, Dave Mitchell knew that Synanon was a story that mattered.

After a Marin County grand jury described Synanon as "an autocracy" that defied local laws, the Light called for public investigations. Mitchell was surprised when the grand jurors were berated by cultists, and their criticisms discounted by county officials, including the district attorney, the county counsel, and the sheriff, Louis Mountanos. "From the beginning," Dave now recalls, "the real problem was that everyone was afraid of Synanon's lawyers."*

Small wonder. Synanon's 40-member legal department often used the courts to silence critics and block efforts at government control. By the end of 1978 its lawyers had filed suits against *Time*, KGO, Marin County and the State of California, and had won a $600,000 libel suit against the Hearst Corp. But while many newspapers avoided the whole subject of Synanon, the *Light* doggedly kept after local government to enforce the law.

Big Business. Then violence erupted in West Marin. In March 1978, when former member Tom Cardineau turned up at Synanon's Marshall commune to show his wife where he had lived, he was viciously beaten by a band of Synanites who called him a spy for Time. The Sheriff's office in San Rafael tried to keep the incident from the press, but the Mitchells were tipped off by the commander of the Point Reyes substation, Art Disterheft. When Dave saw the crime report he understood the cover-up attempt:

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*Underlining has been supplied to highlight the allegedly libelous statements herein.

Sheriff Mountanos, a Synanon admirer, used two cult members as reserve deputy sheriffs. Although the pair had seen Cardineau dragged from his car, they did nothing to help him.

Before publishing this "scoop," the Mitchells had their article checked over by a lawyer friend, Ladd Bedford. After giving them the go-ahead, Bedford accepted what became his usual fee for advising the *Light:* one large pizza (no anchovies). "The Cardineau beating is important news," Cathy told him. "If we can't print it, we'd better quit the news business."

Print it they did, along with a disturbing report that Synanon was returning its headquarters from central California to West Marin, right on the *Light's* doorstep. Using balance sheets filed with the state, Mitchell discovered that Synanon was now West Marin's biggest business, with assets of $20 million and a gross, tax-free income of over $13 million in fiscal '77. Besides Chuck Dederich, its paid board of directors included his son, daughter and brother. "Synanon may call itself a nonprofit organization," a *Light* editorial pointed out, "but the Dederich family drew at least $170,000 in salaries last year."

Impressed by Dave's work, Richard Ofshe, a sociology professor at the University of California, suggested that they get together "because I know a lot about Synanon." Indeed he did. As part of a research project, Ofshe had spent a year at Synanon's West Marin facility in 1972-73. Synanon's "miracle cure" for drug addicts, he told Dave and Cathy, was greatly exaggerated, puffed up by newspapers. Since 1968, minimal drug rehabilitation work had

been attempted; funds, however, were still solicited on that basis. He was particularly worried about recurring acts of violence. "Synanon is tightly controlled," explained Ofshe, who became an adviser to the *Light*. "It must be adopting violence as a *policy*—as a way to scare its enemies and keep members in line."

"Break His Legs." Another vicious attack seemed to confirm Ofshe's fears. Phil Ritter, 34, who'd quit Synanon rather than have a vasectomy, was about to initiate court action to recover his infant daughter from one commune. On September 21, 1978, Ritter was clubbed down by two men who were never caught. He was unconscious for a week. Dave Mitchell ran an anguished editorial, listing numerous violent acts connected with Synanon in past months. "State and county governments seem incapable of finding a pattern to these events," he wrote. "Is *anyone* out there listening?"

One attentive reader was Jack Hurst, former president of Synanon and a member of the organization for 17 years. Pushed out with many of Dederich's original recruits, he had loyally remained silent for two years. But now that his friend Phil Ritter lay near death, he called Dave Mitchell. Among other things, Hurst revealed that a goon squad of "Imperial Marines" was being trained to intimidate Synanon's foes.

Another of Dave's sources was Paul Morantz, a young Los Angeles attorney who'd handled several suits against Synanon. One case involved a woman who was held at the group's Santa Monica facility against her will. Morantz won $300,000 for her.

Soon after, defectors reported, Morantz's name and address were broadcast over "The Wire," a public-address system Dederich used to harangue his followers. When Dave found out, he, Cathy, Ofshe and substation commander Disterheft met with an agent from California's Justice Department. They told him of Synanon's goon squad and warned him that Paul Morantz could be next.

Even as a long-overdue state inquiry into Synanon began, critics of the cult grew nervous. One grand juror found a giant lizard nailed to her driveway; Jack Hurst's guard dog was hanged by its own leash. The worst came on October 10, when Paul Morantz was struck down in a horrific way—bitten on the hand by a four-foot rattlesnake placed inside his mailbox.

Rushed to a hospital, Morantz was saved with 11 vials of antivenin. After a car seen near his home was traced to Synanon, police arrested two "Imperial Marines" and charged them with conspiracy to commit murder and attempted murder. The bizarre Morantz attack aroused all three national TV networks, plus major dailies that had previously shied away from Synanon's litigious lawyers. Soon the *Light* office was crowded with big-city reporters, all poring over back issues or pumping the Mitchells for information. "The American news media," Dave noted wryly, "have picked up Synanon's scent."

Yet their tiny *Light* kept leading the way. When Synanon officials denied any part in the Morantz incident, Dave located ex-member Mary Inskip, a recent dropout, who confirmed that an attack on Morantz had often been encouraged over The Wire by Dederich himself. "When is one of

you cowardly people going to go down there and break his legs?" she recalled him repeating time and again.

With Inskip's dramatic revelation, the *Light* again scooped the rest of the U.S. news media. The Los Angeles *Times* was the first large paper to confirm the story, and even then its legal counsel held it up for a week. Dave and Cathy had simply shown their copy to Ladd Bedford, who made one minor change and then joined them for another pizza.

David vs. the Goliaths. On November 21, 1978—one month after the *Light* exposed Dederich's involvement in the Morantz attack—police raided the Synanon headquarters in Badger, Calif. There they found incriminating cassette recordings of Dederich's frequent musings on The Wire. One in particular foretold Synanon's swing to violence. "We're not going to mess with the old-time, turn-the-other-cheek religious postures," Dederich announced. "Our religious posture is: Don't mess with us. You can get killed. Dead. Physically dead. . . . I'm quite willing to break some lawyer's legs and then tell him, 'The next time I'm going to break your wife's legs. Then I'm going to cut your kid's arms off.' . . . It's a very satisfactory, humane way of transmitting information."

On December 2, Charles Dederich was arrested on charges of conspiracy and solicitation to murder Paul Morantz. The "reformed" alcoholic was carried off on a stretcher, too drunk to walk.

Four months later, the *Point Reyes Light* was awarded journalism's coveted Pulitzer Prize for "Meritorious Public Service." Along with Richard Ofshe, the Mitchells were cited for their "pioneering exposé" of Synanon.

As Point Reyes townsfolk jammed the newsroom, quaffing champagne from plastic cups, Dave and Cathy were interviewed by phone from London and Melbourne while the New York *Times* was waiting on hold. Commented the San Francisco *Chronicle*, "A David in the newspaper field has triumphed over the Goliaths."

*On pleading no contest to the charges against him, 67-year-old Charles Dederich was fined $5000, put on probation for five years and barred from any active part in Synanon. For the snake attack on Paul Morantz, two disciples received one-year jail terms and three years' probation. Eighteen former and present Synanites have since been indicted on kidnapping and assault charges dating back to 1978.*

*And the Point Reyes Light? Well, the circulation of that now-famous paper has almost doubled, to 3200 copies, which compensates David and Cathy Mitchell somewhat for the ironic fact that the Light's public-service prize is the only Pulitzer award without a cash bonus. Why no money? Because this medal has usually been won by wealthy, big city dailies. No one ever expected that journalism's top award would go to a gutsy little weekly like the Point Reyes Light.*

## Appendix G

Paul Alexander
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Attorneys for Defendants
Cathy Mitchell and David Mitchell

Superior Court of California
County of Marin
No. 108199

Louis P. Mountanos,
Plaintiff,

vs.

Reader's Digest Association, Inc.,
(a New York Corporation),
David Mitchell, Cathy Mitchell, David MacDonald,
Richard Ofshe and Does 1-20,
Defendants.

[Filed Oct. 14, 1983]

NOTICE OF JOINDER IN MOTION FOR SUMMARY JUDGMENT FILED BY DEFENDANT READER'S DIGEST ASSOCIATION

Date: October 28, 1983
Time: 2:00 P.M.
Dept: 1

To Plaintiff: Louis P. Mountanos, and his attorneys of record.

Please take Notice that Defendants, David Mitchell and Cathy Mitchell hereby join in the Motion for Summary Judgment, Points and Authorities and Supporting Declarations filed herein by Defendant, Reader's Digest Association, Inc.

Said Motion will be heard October 28, 1983, at 2:00 P.M., or as soon thereafter as the matter may be heard in Department 1 of the above entitled court, located at Hall of Justice, Civic Center, San Rafael, California.

Defendants, David Mitchell and Cathy Mitchell, join in each and every ground therein alleged, and by this Notice adopt the Points and Authorities and Supporting Declarations filed in connection therewith.

DATED: October 13, 1983.

Heller, Ehrman, White & McAuliffe

By /s/ Robert E. Borton
Robert E. Borton
Attorneys for David and Cathy Mitchell

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Attorneys for Defendants
David Mitchell and Cathy Mitchell

Superior Court of the State of California
County of Marin
No. 108199

Louis P. Mountanos,
Plaintiff,

vs.

The Reader's Digest Association,
(a New York Corporation),
David Mitchell, Cathy Mitchell,
David MacDonald, Richard Ofshe
and Does 1-20,
Defendants.

# MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY ADJUDICATION AND IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

[Filed Nov. 14, 1983]

## INTRODUCTION

Plaintiff brings this defamation action in connection with the June, 1981 publication of the Readers Digest article "The Little Paper That Dared." Defendants David and Cathy Mitchell allege by way of affirmative defense that plaintiff's suit is barred by the one year statute of limitations, in Code of Civil Procedure section 340, subdivision (3). Plaintiff counters that this defense is not available to the Mitchells because the running of the statute was tolled, by the Code of Civil Procedure section 351, during the time each was absent from the State. This court has ruled that the statute of limitations defense is available to defendant Readers Digest because, as a corporation, it was present in California throughout the statutory period. The court then heard argument on Readers Digest's motion for summary judgment on the statute of limitations theory on October 28, 1983. Plaintiff has moved for summary adjudication of the statute of limitations issue. Defendants David and Cathy Mitchell hereby oppose this motion and move for summary judgment on the grounds that this action is barred by the statute of limitations.

## FACTS

Plaintiff filed his complaint June 18, 1982. As established by Readers Digest in its motion for summary judgment, the allegedly libelous publication—the article entitled "The Little Paper That Dared," written by David McDonald about the Mitchells' newspaper's coverage of Synanon—was first distributed to the public on June 16, 1981, at the latest. Hence plaintiff's cause of action accrued by that date, and the one-year statutory period expired no later than June 16, 1983, two days before plaintiff filed his complaint.

During this time, David Mitchell—was and remains—a resident of California. He traveled to Thailand for nine or ten days in August, 1981, and to Latin America from approximately March 24 to May 24, 1982. Both trips were related to his work as a journalist.

Cathy Mitchell, also a journalist, spent three days in the state of Washington in November, 1981, to deliver a lecture at Western Washington University; went to Florida for approximately ten days in December, 1981, in connection with a job interview; went to North Carolina for four days in February, 1982, again to pursue her search for employment; and finally left California June 12, 1982, to move to North Carolina, to accept the position she presently holds.

## ARGUMENT

Plaintiff's libel action is governed by Code of Civil Procedure section 340, subdivision (3)[1] which imposes a one-year statute of limitations. Section 351, however, operates to toll the running of the statute for such time as a party is absent from the state.[2] In addition, section 411.10 provides that a civil action is commenced by the filing of a complaint with the court, section 581a requires a complaint be served within three years, and sections 415.20 through 415.50 provide that, in lieu of personal delivery, a sum-

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[1]Unless otherwise indicated, all statutory references are to the Code of Civil Procedure.

[2]Section 351 provides:

> If, when the cause of action accrues against a person, he is out of the state, the action may be commenced within the term herein limited, after his return to the state, and if, after the cause of action accrues, he departs from the state, the time of his absence is not part of the time limited for the commencement of the action.

mons and complaint may be served by various alternative means.

Defendants contend that, in view of their amenability to service of process, the application of section 351 to this defamation action operates as a durational residence requirement, depriving them of their right to travel, and of their right to equal protection of the laws, in violation of the Fourteenth Amendment to the United States Constitution and Article I, § 7 of the California Constitution. For this reason, Section 351 must be found unconstitutional and the Mitchells must be permitted to raise and prove their valid defense to this defamation action.

1. *The Right to Travel is a Fundamental Right.*

The right to travel traces its history to a number of constitutional sources. It was originally recognized as inherent in national citizenship and in the structure of the federal government; hence its protection initially within the Privileges and Immunities clause of Article IV of the Constitution (*Corfield v. Coryell*, 6 F. Cas. 546 (C.C.E.D Pa. 1823)), and later as one of the privileges and immunities guaranteed by the Fourteenth Amendment (The Slaughter-House Cases 83 U.S. (16 Wall.) 36 (1872)) and by the Commerce Clause (*Edwards v. California*, 314 U.S. 160 (1941)). (See Note, *The Right to Travel and Exclusionary Zoning*, 26 HASTINGS L.J. 849 (1975); Note, *A Strict Scrutiny of the Right to Travel*, 22 U.C.L.A. L.Rev. 1129 (1975).)

More recent judicial interpretation, however, characterizes the right to travel as an *individual* interest, protected by the Due Process and Equal Protection clauses of the

Fifth and Fourteenth Amendments, respectively. The Supreme Court first held that travel is a "liberty" interest, within the meaning of the Due Process clause, in a series of cases dealing with passport restrictions. In dictum in *Kent v. Dulles*, 357 U.S. 116 (1958) and more explicitly in *Aptheker v. Secretary of State*, 378 U.S. 500 (1964) the Court invalidated the denial of passports to Communists as an unconstitutional restriction on the right to travel, guaranteed by the Fifth Amendment as an aspect of individual liberty. The Court adopted the "strict scrutiny" standard of review and found that the state had failed to demonstrate the requisite "compelling interest" to justify the restriction.

The Court next considered several cases challenging indirect restraints on the right to interstate travel.[3] In *Shapiro v. Thompson*, 394 U.S. 618 (1969), first, the Court held that the one-year residence requirement imposed by Connecticut, Pennsylvania and the District of Columbia as a precondition to receiving welfare benefits impermissibly "penalized" the exercise of the "fundamental right" to travel. Although declining "to ascribe the source of this right to a particular constitutional provision" (*Ibid.* at 630), the Court impliedly relied on the Equal Protection clause of the Fourteenth Amendment, as to the States, and on the Due Process clause of the Fifth Amendment, as to the District of Columbia. Thus the Court looked not only to the legal status of the right curtailed, but also to the nature of the resulting discrimination:

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[3]In *Haig v. Agee*, 453 U.S. 280 (1981) the Court distinguished "the *freedom* to travel outside the United States . . . from the *right* to travel within the United States," granting greater protection to the latter. (*Ibid.* at p. 306.)

> "There is no dispute that the effect of the waiting-period requirement in each case is to create two classes of needy resident families indistinguishable from each other except that one is composed of residents who have resided a year or more, and the second of residents who have resided less than a year, in the jurisdiction. On the basis of this sole difference the first class is granted and the second class is denied welfare aid upon which may depend the ability of the families to obtain the very means to subsist—food, shelter, and other necessities of life."

(*Ibid.* at 627.) Because the waiting-period requirements thus penalized the exercise of the fundamental right to travel, the Court subjected the state-proffered justification to strict scrutiny:

> "[W]e reject appellants' argument that a mere showing of a rational relationship between the waiting period and [the] admittedly permissible state objectives will suffice to justify the classification. [Citations.] The waiting-period revision denies welfare benefits to otherwise eligible applicants solely because they have recently moved into the jurisdiction. But in moving from State to State or to the District of Columbia appellees were exercising a constitutional right, and any classification which serves to penalize the exercise of that right, unless shown to be necessary to promote a compelling governmental interest, is unconstitutional. [Citations.]

(*Ibid.* at 634) Finding no compelling state interest, the measures were invalidated.

In *Dunn v. Blumstein*, 405 U.S. 330 (1972), the Court considered the constitutionality of Tennessee's one-year residency requirement as a condition to voting in state

elections. Stressing that the requirement was not merely a residence requirement, but a *durational* residence requirement, the Court applied equal protection analysis to what is characterized as a right to travel issue:

> "To decide whether a law violates the Equal Protection Clause, we look, in essence, to three things: the character of the classification in question; the individual interests affected by the classification; and the governmental interests asserted in support of the classification. In considering laws challenged under the Equal Protection Clause, this Court has evolved more than one test, depending upon the interest affected or the classification involved. First, then, we must determine what standard of review is appropriate. In the present case, whether we look to the benefit withheld by the classification (the opportunity to vote) *or* the basis for the classification (*recent interstate travel*) we conclude that the State must show a substantial and compelling reason for imposing durational residence requirements."

(*Ibid.* at 335. Footnote omitted. Emphasis supplied.) (*Cf. Vostack v. Axt*, 510 F. Supp. 217 (S.D. Ohio 1981).) Thus the Court found that strict scrutiny was warranted not only because durational requirements deprive newcomers of the right to participate in state and local elections on an equal basis, but also on the ground that such "laws classify bona fide residents on the basis of recent travel, penalizing those persons, and only those persons, who have gone from one jurisdiction to another during the qualifying period. *Thus, the durational residence requirement directly impinges on the exercise of a second fundamental personal right, the right to travel.*" (*Ibid.* at 338. Emphasis supplied.) Find-

ing no compelling interest, the Court invalidated the one-year requirement.

Elaborating on this right to travel analysis, the Court in *Memorial Hospital v. Maricopa County*, 415 U.S. 250 (1974), invalidated an Arizona statute requiring a year's residence in a county as a condition to an indigent's receiving non-emergency medical care. The Court distinguished mere residence requirements from durational residence requirements, stating that only the latter warranted strict scrutiny. (*Ibid.* at 255.) The Court then concluded that "Arizona's durational residence requirement for free medical care penalizes indigents for exercising their right to migrate and settle in that State." (*Ibid.* at pp. 261-262.) As in *Shapiro* and in *Dunn*, the Court was not persuaded that the state's justifications met the compelling interest test.

2. *Section 351 Impermissibly Penalizes the Mitchell's Right to Travel.*

The *Shapiro-Dunn-Maricopa* line of cases dictates a fairly straightforward approach applicable to defendant's challenge to section 351.[4] Where a state's durational residence requirement selectively *penalizes* the exercise of the fundamental right to travel—that is, denies to those who have travelled the benefits that would otherwise accrue to them as residents—the state must demonstrate a compelling

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[4]The year after *Maricopa* was decided the Court decided *Sosna v. Iowa*, 419 U.S. 393 (1975). In *Sosna* appellant challenged Iowa's one-year durational residence requirement for obtaining a divorce. With only passing reference to its recently decided right to travel cases and no "penalty analysis", the Court upheld Iowa's statute on

interest to justify the discriminatory restraint. By tolling the one-year statute of limitations for libel actions for such time as a party—indeed, a resident—is temporarily absent from the state, section 351 effectively operates as a durational resident requirement, and thus selectively penalizes the right to travel. California discriminates against those who have exercised their constitutional right to travel by denying them the benefit of the statute of limitation in direct proportion to the extent of their absence.

The requirement under the *Shapiro* analysis that a durational residence requirement be shown to "penalize" the fundamental right to travel does not, of course, imply that the underlying benefit denied to travellers—in this case the protection of the statute of limitations—itself be a fundamental right. The Court has stated, in fact, that there is a statutory, but not a "fundamental" right to welfare benefits, such as were at issue in *Shapiro*. (*Goldberg v. Kelly*, 397 U.S. 254 (1970).) Nor is indigency a "suspect classification." Moreover, if the underlying benefit denied on the basis of travel were itself a constitutionally recognized fundamental right, its infringement could be remedied as such, without resort to right to travel analysis. Thus although there is no "fundamental right" to the protection of

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several grounds which distinguish the case from the *Shapiro* line. Principally, the Court noted that laws relating to domestic relations have traditionally been regarded as important state concerns (*Ibid.* at p. 404.) Moreover, the Court noted that divorce is not a matter affecting merely the individual and the state, but also spouses, and possibly children and property as well; hence Arizona's legitimate interest in avoiding "officious intermeddling" in legal matters in which *other states* have an interest. (*Ibid* .at 407.) Thus *Sosna* presented the Court with different concerns from those confronting it in *Shapiro, Dunn*, or *Maricopa*, and dictated a different analysis and result.

a statute of limitations, *Chase Securities Corp. v. Donaldson*, 325 U.S. 304 (1945), the Mitchells have shown that section 351 selectively and unjustifiably penalizes their exercise of the right to travel.

That the operation of a tolling statute penalizes the right to travel is obvious. David and Cathy Mitchell may only travel out of California at the cost of extending the statutory period during which they may be sued for libel. Moreover as journalists, whose very livelihood depends on travel, the First Amendment right to freedom of speech is clearly implicated. Indeed, as stated in David and Cathy's declarations, their travels outside California were professionally required.[5]

That section 351 penalizes the exercise of the right to travel on a selective and therefore discriminatory basis is evident not only from the obvious fact that residents who remain within the state for a year are entitled to legal protections denied to those residents who travel out of the state during the same period, but also from the fact that the tolling provision discriminates against individual residents and in favor of corporate entities doing business in the state. In *Loope v. Greyhound Lines, Inc.*, 114 Cal.App.2d 611 (1952) the court held that section 351 is inapplicable to foreign corporations doing business in the state. Thus in this case Readers Digest, the New York Corporation that actually published the allegedly defamatory article, has

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[5]Interestingly, First Amendment issues were also indirectly at issue in *Aptheker v. Secretary of State*, 378 U.S. 500, *supra*. Aptheker was editor of the journal "Political Affairs," as well as a member of the Communist Party, and the Court was mindful of the impact of curtailment of the right to travel on Aptheker's First Amendment rights to free speech and assembly.

been permitted to raise the statute of limitations defense, while David and Cathy Mitchell, who did not publish the article but are merely its subject, are denied the benefit of the statute of limitations because their work took them outside the state. This disparate treatment of codefendants is patently unfair.

Because section 351 selectively penalizes the exercise of the fundamental right to travel, under *Shapiro* only a compelling state interest will justify the restraint. In view of the legislative scheme governing service of process in California, this strict test simply cannot be met. Section 411.10 provides that an action is *commenced* with the filing of a complaint, while sections 415.20 through 415.50 provide ample and detailed means for service of the summons and complaint on persons outside the state. Thus there is absolutely no reason—much less a compelling reason—to toll the statute of limitations during the time a party is absent but amenable to service. In this case both David and Cathy Mitchell were readily amenable to service of process throughout the statutory period. Indeed, David Mitchell was in the state and subject to personal service when the plaintiff finally chose to file his complaint at least two days after the statute of limitations had run. Plaintiff could have preserved his rights merely by timely *filing* his complaint.

3. *California Law.*

Defendants are aware that the California Supreme Court has considered the issue whether section 351 is applicable when a party who is out of the state is nonetheless amenable to service of process. In *Dew v. Appleberry*, 23 Cal. 3d 630 (1979), defendant in a personal injury tort action was absent from the state for five weeks visiting his parents.

The Supreme Court rejected his argument that because he was at all times amenable to service, section 351 should not be applied to toll the statute of limitations. *Dew* may arguably be distinguished on the ground that defendant's right to travel argument was addressed narrowly and exclusively in terms of criminal law. Citing only *Scherling v. Superior Court*, 22 Cal. 3d 493 (1978), the Court reasoned that the likelihood of the detection of a crime and the identification of a criminal might be greater if the accused were actually physically present in the state. (*Ibid.* at 223.) More to the point, however, because the Court ultimately concluded that the application of section 351 to toll the statute of limitations in the civil matter before it did *not* "penalize the exercise of a fundamental constitutional right," *Dew* contravenes the right to travel doctrine set out by the United States Supreme Court in *Shapiro, Dunn* and *Maricopa*, and must therefore be disapproved on federal constitutional grounds. Indeed, in holding that the statute of limitations is tolled while a party is outside the state notwithstanding the amenability of service of process, California has adopted a minority view and a view which the Mitchells submit cannot withstand constitutional scrutiny.[6]

4. *Related Federal Law.*

Federal courts have considered the propriety of tolling statutes of limitations in two related but not directly controlling areas. First, the Supreme Court has upheld against equal protection challenge a New Jersey statute tolling the

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[6]For a detailed discussion of the states' positions on the issue of the effect of amenability of service on tolling legislation, *see* Annot., 55 A.L.R. 3d 1158 (1974).

statute of limitations as to a foreign corporation not represented in the state by an agent or officer upon whom process could be served. (*G.D. Searle & Company v. Cohn*, 455 U.S. 404 (1982).) The Court rejected the argument that the tolling provision impermissibly discriminated against foreign and in favor of domestic operations, and applied the minimal or "rational basis" test to uphold the statute. (*See also Brackney v. Combustion Engineering, Inc.*, 674 F.2d 812 (9th Cir. 1981.) However, in these cases no right to travel argument was presented—nor could have been—as to the corporate entities involved.

Second, the Supreme Court has considered the relationship between statutes of limitations and actions brought under 42 U.S.C. § 1983. In *Board of Regents v. Tomanio*, 446 U.S. 478 (1980), the Court held that state statutes of limitations—deemed "binding rules of law," rather than mere technicalities—should apply in section 1983 actions, "unless inconsistent with the Constitution or other federal law." (*Ibid.* at 484.) The Court ruled that New York's provision that its statute of limitations was not tolled during the pendency of a related action was not inconsistent with federal law, and barred the cause of action before it. Then in *Mauer v. Ind. etc.*, 691 F.2d 434 (9th Cir. 1982), the Ninth Circuit held that California's section 351 was not inconsistent with section 1983, the federal *statute*, but, contrary to the mandate of the Supreme Court in *Tomanio*, simply failed to consider whether the tolling provision at issue was consistent with *constitutional* provisions. Thus *Mauer* offers no analysis of the right to travel or broader equal protection questions as concern section 351.

## CONCLUSION

The application of section 351 to bar the Mitchells' statute of limitations defense produces an unfair and anomalous result. Readers Digest, the corporate defendant which published the allegedly libelous article, is insulated from suit because it is deemed continuously present in the state. Yet the two journalists, who are not the authors, but the subject to the article, are denied the protection of the statute of limitations because, though at all time amenable to service, they were periodically absent from the state. That these individual defendants should be forced to defend this action, under these circumstances, violates the equal protection guarantees of the California and United States constitutions.

Dated: Nov. 14, 1983

Heller, Ehrman, White &
McAuliffe

By/s/Andréa Asaro
Andréa Asaro
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Superior Court of the State of California
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Louis P. Mountanos,
Plaintiff,

vs.

The Reader's Digest Association,
(a New York Corporation),
David Mitchell, Cathy Mitchell,
David MacDonald, Richard Ofshe
and Does 1-20,
Defendants.

[Filed Nov. 14, 1983]

# DECLARATION OF DAVID MITCHELL

I, DAVID MITCHELL, declare as folows:

1. I am one of the defendants in this case. The matters stated in this declaration are known personally to me and, if sworn, I could and would competently testify to the truth thereof. This declaration is made as part of my opposition to plaintiff's motion for summary adjudication of issues with respect to the defense of statute of limitations.

2. As we have stipulated with the plaintiff, I was out of California for more than two months during the year prior to June 18, 1982. My travel consisted of the following:

(a) In August 1981, I left California for approximately nine or ten days to travel to Thailand. This travel, which was undertaken at my own expense, was for the purpose of investigating and writing news stories, two of which were later published in the San Francisco Examiner.

(b) In the Spring of 1982, I was sent on assignment to Central America by the San Francisco Examiner. I left California on about March 23rd or 24th, 1982 and returned in late May 1982 (probably on or after May 24th).

3. All of my travel outside the State of California during that year was done as part of my employment as a journalist, either on a freelance basis (the 1981 travel) or as a reporter for the Examiner (the 1982 travel).

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed this 10 day of November, 1983, at Point Reyes Station, California.

/s/ DAVID MITCHELL
David Mitchell

Paul Alexander
Robert E. Borton
Pamela A. Mull
Andrea G. Asaro
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David Mitchell and Cathy Mitchell

Superior Court of the State of California
County of Marin
No. 108199

Louis P. Mountanos,
Plaintiff,

vs.

The Reader's Digest Association,
(a New York Corporation),
David Mitchell, Cathy Mitchell,
David MacDonald, Richard Ofshe
and Does 1-20,
Defendants.

[Filed Nov. 16, 1983]

# EXECUTED DECLARATION OF CATHERINE MITCHELL

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Superior Court of the State of California
County of Marin
No. 108199

Louis P. Mountanos,
Plaintiff,

vs.

The Reader's Digest Association,
(a New York Corporation),
David Mitchell, Cathy Mitchell,
David MacDonald, Richard Ofshe
and Does 1-20,
Defendants.

## DECLARATION OF CATHERINE MITCHELL

I, CATHERINE MITCHELL, declare as follows:

1. I am one of the defendants in this case. The matters stated in this declaration are known personally to me and, if sworn, I could and would competently testify to the truth thereof. This declaration is made as part of my

opposition to plaintiff's motion for summary adjudication of issues with respect to the defense of statute of limitations.

2. During the year prior to June 18th, 1982, I left the State of California on several occasions:

(a) In November, 1981, I left the State on a Thursday to go to the State of Washington, on business, as a guest lecturer at Western Washington University. I cannot remember the exact date, but I left California on a Thursday and returned the next Saturday, two days later.

(b) In December, 1981, I left the State of California on December 21st and returned to California on December 31st. The purpose of this trip was to visit family and to interview for a job position in Florida.

(c) In February, 1982, I went to North Carolina to interview for my present job. I left California on February 11th and returned on February 15th, 1982.

(d) On June 12th, 1982, I left the State of California to move to North Carolina where I presently live and work. My purpose in moving to North Carolina was to accept a job in the Department of Literature and Language at the University of North Carolina at Asheville.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed this 11th day of November, 1983 at Asheville, North Carolina.

/s/ CATHERINE C. MITCHELL
Catherine Mitchell

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Superior Court of the State of California
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David Mitchell, Cathy Mitchell,
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and Does 1-20,
Defendants.

[Filed Nov. 14, 1983]

# DECLARATION OF ROBERT E. BORTON

I, ROBERT E. BORTON, declare as follows:

1. I am an attorney licensed to practice in the State of California and am one of the attorneys for defendants David and Cathy Mitchell. The statements in this declaration are based on my personal knowledge and, if sworn, I could and would competently testify to the truth of these matters.

2. Plaintiff Louis Mountanos has made a motion for partial summary judgment in which he seeks a determination that the Mitchells may not rely upon the defense of the statute of limitations. In addition to making that motion, Sheriff Mountanos has made a request for expenses and attorney's fees under CCP § 128.5(a). It is that request, supported by the Declaration of Sheriff Mountanos' lawyer, to which this declaration responds.

3. As the Mitchell's briefs in opposition to Sheriff Mountanos' motion make clear, there are real and serious issues to be addressed on the subject of the statute of limitations defense, the use of that defense by individual defendants as opposed to corporate parties and the effect on that defense of Code of Civil Procedure Section 351. It is certainly true, as Sheriff Mountanos' lawyer points out, that the Court has previously heard motions on related issues and has entered rulings on those motions. Those motions were not directed to the Mitchells, however, and the Mitchells are fully entitled to raise and argue fundamental legal issues in their defense, just as they are entitled to make a record for the purpose of appeal in this action. The dispute, these issues, the Mitchells' motion—and undoubtedly the motion brought by Sheriff Mountanos—

are certainly made in good faith, and can hardly be categorized as either frivolous or undertaken for the purpose of delay. The request under CCP § 128.5(a) must, therefore, be denied. There are additional matters in Ms. Green's declaration, however, to which I now respond, which further demonstrate that the request for attorneys' fees now made is totally lacking in merit.

4. It was not until the hearing on the Reader's Digest motion for summary judgment on October 28, at which time the parallel motions by several individual defendants were also noticed, that Ms. Green first raised the question addressed by her motion today. She had earlier brought a motion for partial summary judgment against Reader's Digest and the author David MacDonald, but had elected not to seek to resolve such issues with respect to the Mitchells or the other individual defendants. Thus the issue remained open, presenting—as it still presents—issues both of fact and of law which the Court must address and resolve. Now that issue will be heard, in effect on cross-motions for summary judgment. This is an entirely appropriate procedure for *both* parties to use.

5. At the time of the hearing on the 28th, Ms. Green made no alternate suggestion about ways to resolve this issue in some other way, but rather served a notice of motion for summary judgment and, with it, a notice of deposition for the four individual defendants on Monday, November 7, 1983. The depositions were her idea, noticed by her, with no suggestion that she was not either interested or serious about taking those depositions.

6. It was not until our letter of November 4 was delivered to Ms. Green's office, apparently, that she began to

consider the idea of a stipulation to certain facts. A copy of that letter accompanies this declaration. The idea of a stipulation was offered *not* by Ms. Green, but by this office since, as set forth in our letter, defendant Cathy Mitchell cannot be required to come to California for her deposition. I then received a call on Friday, November 4, 1983, from someone in Ms. Green's office, *not* from Ms. Green, to discuss our letter. In that brief conversation, I was asked if we were interested in making a stipulation on behalf of David Mitchell but, since his deposition was already scheduled, since he planned to be in San Francisco for that deposition on Monday morning and since I did not know the nature or extent of the information which would be elicited in that deposition, and in fact had not discussed the issue with him in detail, this seemed unnecessary. There was no suggestion from the person I talked to that this was considered important or that Ms. Green was not interested in or desirous of going ahead with the depositions which she had noticed. I asked whether the depositions of other witnesses would proceed as scheduled and was told that Ms. Green's office had not yet talked with others. None of the things now stated in Ms. Green's declaration were alluded to in that conversation. If Ms. Green did not wish to take David Mitchell's deposition, however, she could—but did not—tell me that and ask for a stipulation with respect to him. Our office had already expressed a willingness to arrive at such a stipulation with respect to Cathy Mitchell.

7. The deposition of David Mitchell was taken, very briefly, on Monday morning, November 7. At the conclusion of the deposition Ms. Green asked if we would stipulate to the information in the deposition. I assumed that the pur-

pose of that request was to hasten her ability to file and serve her motion, since she told me it had to be served that afternoon. For that reason, and in an endeavor to be cooperative, I agreed to the stipulation, though I certainly did not expect that the result would be to create an argument that, because we had gone ahead with a deposition *noticed by Ms. Green*, and had then agreed to sign a stipulation, we were somehow acting in bad faith. I categorically deny the allegation of bad faith. The true fact is that our office—and our client—was at all times acting in good faith.

8. Ms. Green suggests that David Mitchell "forced" her to take his deposition. That is not true. Mr. Mitchell appeared at his deposition at the date and time demanded by Ms. Green to discharge his obligation of responding to discovery. It was Ms. Green—and not Mr. Mitchell—who chose the date, time and method of discovery. Every party is entitled to prosecute and defend their case and has the burden of establishing that case. This applies to Sheriff Mountanos just as it does to other parties. Ms. Green also goes on to state that we agreed to stipulate to the facts before the Court after Mr. Mitchell's testimony "proved the lack of merit in his position." As noted above, it was Ms. Green who initiated the discovery process and selected the method of discovery. The record created for this motion establishes, we believe, the merit of Mr. Mitchell's defense. But whether an issue is won or lost, the factual record must be created and Mr. Mitchell simply responded to Ms. Green's request for a deposition. CCP § 128.5 is not designed to create an attorney's fee clause in every motion, to be used as a threat should a litigant assert and seek to establish claims or defenses in a lawsuit. It is particularly inappropriate where,

as here, Mr. Mitchell simply appeared at a deposition noticed by Ms. Green. For all of those reasons, the request for expenses and attorneys' fees is both inappropriate and utterly without merit.

I declare under penalty of perjury under the laws of that State of California that the foregoing is true and correct.

Executed this 14th day of November, 1983, at San Francisco, California.

/s/ ROBERT E. BORTON
Robert E. Borton

HELLER, EHRMAN, WHITE & McAULIFFE

[Letterhead]

November 4, 1983

HAND DELIVERED
Sharon Green, Esq.
333 Market Street
Thirty-Second Floor
San Francisco, California 94105

Mountanos v. Playboy, et al.

Dear Sharon:

As you may know, Cathy Mitchell is no longer a resident of California but now lives in Asheville, North Carolina. Thus, she cannot be required to attend a deposition in California and some other arrangement will have to be made for the brief deposition presently noticed for Monday, November 7, 1983.

Since I know that the purpose of the deposition is to enable you to develop a record for the purpose of your motion under CCP § 351, and since the motion is presently set for November 18, there may be another way to permit this question to be resolved. I believe that Cathy Mitchell left California to move to North Carolina on approximately June 4, 1982 and that she was not back in the state prior to the filing of your complaint later that month. Since, even under the Reader's Digest theories, general distribution of the magazine did not take place before June 4, this would appear to be a sufficient record for purposes of the motion. We can verify the exact date of Cathy

Mitchell's departure from the state and would propose a stipulation to these facts. Could you please call Paul Alexander or me to talk about this proposal.

Very truly yours,

/s/ ROBERT E. BORTON
Robert E. Borton

cc: Cathy Mitchell
David Mitchell

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